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IN the SUPREME COURT of the UNITED STATES

October Term 1947

Appeal Docket No. 609

FULL SALVATION UNION
(a Michigan Religious Corporation) and
J. F. ANDREWS,
Appellants

vs.

PORTAGE TOWNSHIP
(Kalamazoo County, Michigan)
Appellee.

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR REHEARING

Appellants submit this Petition for Rehearing pursuant to Rule 33 of this Court. On March 15, 1948, the Appeal in the above entitled cause was denied Per Curiam on the ground that a substantial federal question was not involved, one Justice holding that probable jurisdiction should be noted and another Justice holding that the question of jurisdiction should be postponed until after a hearing on the merits.

We respectfully represent to the Court that substantial federal questions are involved for these reasons:

TO DENY THIS APPEAL MEANS:

I. Denial of the right to carry on a Camp Meeting.

II. Denial of the right to use one's own property to to carry on a Camp Meeting.

III. Denial of the right to build a Church.

IV. Denial of the right to use one's own property for a Church.

A. As To The Camp Meeting

TO DENY THIS APPEAL MEANS:

I. Denial of the right to carry on a camp meeting. Appellants will be totally excluded from carrying on the religious activity of a camp meeting anywhere in Portage Township—a wholly rural area of 36 square miles.

The ordinance is construed and applied to forbid absolutely a camp meeting use at any time and anywhere in Portage Township and under any circumstances.

A camp meeting is a lawful religious activity.

A zoning ordinance cannot wholly forbid a lawful religious activity regardless of any other facts or circumstances.

The facts established at the trial as contained in the Record and as set forth in the Jurisdictional Statement demonstrate that the camp meeting use of appellants is a lawful activity in the place, in the spot, where carried on. The 15 acre tract of woods is an ideal location and the camp meeting use thereof is reasonable in relation to the surrounding farm and vacant property.

To deny absolutely to appellants this camp meeting use in Portage Township is an unreasonable abridgement of religous freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

TO DENY THIS APPEAL MEANS:

II. Denial of the right to use one's own property to

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carry on a camp meeting. The 15 acre tract of woods owned in fee, the tabernacle (a building 60' x 60', seating 500 persons), the caretaker's cottage, a year-round residence (a building 20' x 20') and the garage in connection therewith, all erected under building permits and mostly by donated labor, **will be rendered wholly useless** to Full Salvation Union since they canot be used for the religious activity of a camp meeting.

A camp meeting use on the property of Full Salvation Union, in Portage Township, being a reasonable use, the ordinance and the injunction deprive Full Salvation Union of its property contrary to the due process of law guaranteed by Amendment XIV of the U. S. Constitution.

B. As To The Church

TO DENY THIS APPEAL MEANS:

III. Denial of the right to build a church. Appellants will be arbitrarily prevented from completing the partially constructed church building on the property of Full Salvation Union in Portage Township and will be prevented from holding services therein.

Appellants are ordered by the injunction to remove said building solely because the Township Board arbitrarily refused to grant a permit for its construction. The Board granted informal permission to erect the church building and then later arbitrarily refused to grant a formal permit for its construction and appellants are ordered by the injunction to remove all buildings erected without permits. Consequently appellants will not be able to complete the building and hold religious services therein each Sunday during the year.

Arbitrary refusal to permit the construction of a church building for religious worship is an unreasonable

abridgement of religious freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

TO DENY THIS APPEAL MEANS:

IV. Denial of the right to use one's own property for a church. The partially constructed church (a building 24' x 30') erected by donated labor for religious worship, a lawful use under the ordinance **must** under the terms of the injunction, together with the toilet system and the large septic tank in connection therewith, **be removed and rendered useless** to Full Salvation Union, since such property cannot be used either in connection with the camp meeting or for year round religious services.

Such deprivation of property is contrary to the due process of law guaranteed by Amendment XIV of the U. S. Constitution.

DENIAL of the right to carry on a Camp Meeting—

DENIAL of the right to use one's own property to carry on a Camp Meeting—

DENIAL of the right to build a Church—

DENIAL of the right to use one's own property for a Church—

These are gross violations of the fundamental rights of appellants to religious freedom and the reasonable use of property in its exercise.

To raise these questions, under the law as hereinafter discussed, as to the authority of Portage Township to deprive appellants of these fundamental religious and property rights under Amendments I and XIV of the U. S. Constitution, it is submitted, is to raise substantial federal questions.

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DISCUSSION OF LAW

The injunction by which appellants are being deprived of these Constitutional rights is invalid—

A. AS TO THE CAMP MEETING

Point One

Because the **blanket exclusion** by the ordinance of the Camp Meeting use from the entire Township, an area of 36 square miles, is **arbitrary and unreasonable.**

BLANKET EXCLUSION
UNREASONABLE

By the ordinance all 36 square miles of the 36 sections in the Township are placed in the A-Residence district (3 sections) and the B-Residence district (33 sections) with exceptions therefrom (a) of small areas for C, D and E use districts where Local Business, Commercial and Industrial uses are conducted, and (b) of land covered in 51 recorded plats of which 32 are entirely restricted to A or B-Residence and 17 are entirely restricted to A or B-Residence with small exceptions for C and D districts where Local Business, Commerce or Industry is located, leaving 2 plats for C, D and E uses now devoted to Local Business, Commerce and Industry. Thus practically the entire Township is restricted to A and B-Residence.

By the ordinance, last paragraph of Sec. 2, and Sec. 3 as to A-Residence and Sec. 4 as to B-Residence, no building or use is possible unless authorized and a Camp Meeting use is not authorized in A or B-Residence districts—the only possible areas in the Township. As acknowledged by the Board and by the attorney for the Township they "never thought of a Camp Meeting when

the ordinance was drawn up" (Record 235), and the prohibition of tents throughout the entire Township "was an oversight when they drew up the ordinance" (Record 244). Hence a Camp Meeting use is completely excluded from Portage Township.

Such a blanket exclusion of a legitimate religious use from an area of 36 square miles is **arbitrary** and **unreasonable** since it has no relation to health, safety, morals or general welfare. Therefore, the injunction which rests on the blanket exclusion is invalid, as a denial of religious freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

Blanket exclusion of distribution of literature by an ordinance is held invalid.

Martin v. City of Struthers, Ohio
319 U. S. 141 (1943)

Schneider v. State (first 3 cases)
308 U. S. 147 (1939)

Jamison v. Texas
318 U. S. 413 (1943)

and likewise the right to hold a Camp Meeting in Portage Township "may not be prohibited at all times, at all places, and under all circumstances."

An ordinance closely analogous to that in the instant case was held unreasonable because out of 2500 acres only 1 1/10 acres were designated as an "unrestricted district" for business uses and it was already fully occupied.

Ex parte White
195 Cal. 516, 234 Pac. 396 (1925).

An ordinance was held invalid where the Board had relegated "business and industry to a very small sec-

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tion," of the village, "in order to preserve it as a secluded quiet community of one-family detached homes."

Dowsey v. Village of Kensington
257 N. Y. 221, 177 N. E. 427 (1931)

A zoning ordinance which excluded a tuberculosis hospital from every part of the town was held invalid on the ground that it could not wholly exclude a legitimate use.

Jewish Consumptives' Relief Society v. Town of Woodbury
230 App. Div. 228, aff'd 256 N. Y. 619 (1931)

On this point alone, that a blanket exclusion from 36 square miles is unreasonable, the injunction should be dissolved.

Possibility of Rezoning

Nor is the blanket exclusion or the injunction saved by any possibility of rezoning.

The 15 acre tract of woods is in Section 23 and zoned as B-Residence. If the tract were rezoned into C-Local Business, the Camp Meeting use would be possible but such rezoning was either arbitrarily refused by the Township Board or the Board had no power to rezone so that the injunction resting on the blanket exclusion is invalid.

REZONING ARBITRARILY REFUSED

By Sec. 1 of Public Act No. 69, 1939, of Michigan, the Township Board is given authority to "restrict and determine the areas within which given forms of land utilization shall be prohibited or encouraged. . ."

Under date of Dec. 13, 1943, and at the Board meeting on Dec. 22, 1943, appellants requested an amendment

(Record 62-63, 236-7) and the request was repeated July 13, 1944 (Record 66-67) and was the substance of Appellants' lengthy negotiations with the Board from Nov. 5, 1943 to July 14, 1944, (Record 56, 62-3, 66-67, 226-7, 230-239), but at no time would the Board take formal action to rezone the 15 acres of woods into Zone C although the Board did take such action for others (Record 67-68).

The Board's refusal to rezone was unreasonable and arbitrary as shown by the nature of the property and its relation to surrounding property as fully described in Appellant's Jurisdictional Statement and hereinafter developed in Points II and III. The arbitrary refusal to rezone will not support the injunction.

City of W. Uni. Place v. Ellis
134 S. W. (2nd) 1038 (Com. App. Tex., 1940)

Regardless of the foregoing it has been held that application for rezoning or amendment of the ordinance is not necessary in order to assert one's rights to his property when an ordinance is arbitrary and unreasonable.

Euclid v. Ambler Co. 272 U. S. 365, 386 (1926)

Dowsey v. Village of Kensington (headnote No. 3 and citing Euclid v. Ambler p. 228)
257 N. Y. 221, 228, 177 N. E. 427 (1931)

NO POWER TO REZONE

Basing the Board's refusal to rezone on lack of power to rezone is just as fatal to the validity of the injunction.

The ordinance was adopted January 16, 1942, pursuant to Public Act No. 302, 1937, as amended by Public Act No. 69, 1939. By Public Act No. 184, eff. July 30, 1943, a new statutory system for Township zoning was adopted and Public Act No. 302, 1937, as amended, was

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repealed but by Sec. 26 prior ordinances continued effective until a new ordinance should be adopted. Under this state of the statutes, Portage Township or its Board had no authority to amend the ordinance. "Section 26 does not in express language purport to authorize the amendment of previously adopted ordinances and as the power to amend ordinances is an incident to the power to enact them, it is my opinion that a revocation of the power to enact likewise operates as a revocation of the implied power to amend in the absence of express language or a clear intent to the contrary". **Op. Atty. Gen'l Mich.**, Nov. 16, 1943, No. O-1558.

This statutory impasse made it impossible for the Township or its Board to amend the ordinance to rezone the 15 acres of woods from B-Residential to C-Local Business and to comply with constitutional requirements of reasonableness and thereby rendered the ordinance inoperative and invalid as to the Camp Meeting use.

To leave no discretion in the Township Board makes the ordinance unconstitutional. In **Eubank v. Richmond** 226 U. S. 137 "The ordinance was held bad by this court (p. 143) because it left no discretion in the committee." Gorieb v. Fox 274 U. S. 603, 610 (1927).

Hence the rigid ordinance exclusion of the Camp Meeting use from the entire 36 square miles is unreasonable and arbitrary and will not support the injunction.

That the Michigan statutes were amended on Oct. 11, 1947 [Mich. Stat. Ann. 1947 Cum. Supp. Sec. 5.2963 (26)], two days before the Michigan Supreme Court's opinion was filed on Oct. 13, 1947 in this case, to remedy this inflexible situation by making ordinances under Act of 1937 operative under the Act of 1943, cannot affect appellants' rights to have the Circuit Court's injunction of March 14, 1945 dissolved.

Point Two

The injunction is invalid because the **exclusion from B-Residence district** in Portage Township of a Camp Meeting use is **arbitrary and unreasonable—**

TEST OF REASONABLENESS
CHARACTER OF RESTRICTED AREA

One test of reasonableness of an exclusion of a use by a zoning ordinance is the character of the restricted area as shown by its development and the uses therein permitted and conducted.

Portage Township is wholly rural having no urban areas. Portage Center having a gas station, barber shop, post office and fire station, where the Township Board meets is the center of activity (Record 53, 86-87).

As stated above, 33 sections of the Township are placed in B-Residence district. Appellants land is in Sec. 23, a part of the B-Residence district. The uses authorized in B-Residence district are private and two family dwellings, churches, public schools, libraries, farming and truck gardening including "necessary farming stables or barns or other buildings or outbuildings for the shelter of any number of animals," multiple dwellings, hotels, private clubs, boarding houses, hospitals, institutions of an educational, philanthropic, or eleemosynary nature, nursery and greenhouses, accessory buildings, public garages and golf courses (Ordinance, Sec. 4).

Appellants' Camp Meeting use is not so different from these as to justify exclusion.

Denial of the right to construct and to use buildings for an orphanage in a residential suburb of Cleveland, Ohio was held unreasonable because "the proposed use is not so different in character from concededly legitimate

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uses as to bring it within the scope of the police power of the municipality."

Village of Uni. Heights v. Cleveland Jewish Orphans Home.
20 F. (2d) 743 (C. C. A. 6th, 1947) cert. den. 275 U. S. 569 (1927).

Denial of the right to use property, acquired after adoption of ordinance, for an old ladies' home in the most restricted residential district of Kansas City, Mo., was held unreasonable because "not an essential of the general zoning plan...and so arbitrary and unreasonable as to be void."

Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.
58 F. (2d) 593 (C. C. A. 8th, 1932)

Denial of the right to construct a church in a residential district of Reno, Nevada, was held unreasonable and void as violating "Due Process provisions of both the Constitution of the United States and the Constitution of the State of Nevada," the Nevada Supreme Court stating:

"The validity of Sections 7 and 8 of the Zoning Ordinance has been challenged on several grounds, but we have found it necessary to consider but one. The great weight of authority convinces us that these sections, as applied to the property involved in this case, bear no substantial relationship to the promotion of the health, safety, morals, convenience, property or general welfare of the City of Reno, or of its Residential District, and that they constitute an invasion of the property rights of petitioner corporation." [The court citing]

Roman Catholic Archbishop v. Baker
140 Or. 600, 15 P. (2d) 391

Village of Uni. Hts. v. Cleveland Jewish Orphans Home
6 Cir., 20 F. (2d) 743

Women's Kansas City St. Andrew Soc. v. Kansas City, Mo.
8 Cir., 58 F. (2nd) 593

Western Theo. Seminary v. Evanston
325 Ill. 511, 156 N. E. 778

City of Miami Beach v. State
128 Fla. 750, 175 So. 537

State of Wash. ex. rel. Seattle T. T. Co. v. Roberge
278 U. S. 116—

And the court continued: "As against these authorities, cases involving livery stables, garages, gasoline stations, funeral parlors, billboards, two-family residences, morgues, launderies etc. afford us little aid in the instant case. The law distinguishes between such cases and those relating to churches, schools, parks and playgrounds, art galleries, library buildings, community center buildings etc."

State ex rel. Roman Catholic Bishop of Reno v. Hill, 59 Nev. 231, 90 P. (2nd) 217 (1939).

Denial of the right to construct a church in a residential suburb of Columbus, Ohio, was likewise held unreasonable and void in

State ex rel. Synod of Ohio of United Lutheran Church in America v. Joseph et. al.
139 Ohio State 229, 39 N. E. (2nd) 515 (1942)

Denial of the right to construct a church in Class A-Residential district of City of Mesa, Ariz., was held "clearly arbitrary and unreasonable" since within the district "storage of fertilizer, maintenance of horses,

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cows, swine, farms, greenhouses, swimming pools, polo fields and golf courses as well as schools and the like was permitted."

Ellsworth, Bldg. Inspector v. Gercke
62 Ariz. 198, 156 Pac (2nd) 242 (1945)

Other cases applying the same principle include:

City of Amarillo v. Stapf
109 S. W. (2nd) 258 (Civ. App. Tex., 1937)

Del Fanta v. Sherman
107 Cal. App. 746, 290 Pac. 1087 (1930)

Pacific Palisades Assn. v. City of Huntington Beach
196 Cal. 211, 237 Pac. 538 (1925)

Appellants' Camp Meeting use in a 15 acre tract of woods surrounded by farm and vacant property is clearly analogous in fact and principle. The exclusion of appellants' Camp Meeting use from B-Residence district in Portage Township is likewise arbitrary and unreasonable. On this point alone the injunction should be dissolved.

Point Three

The injunction is invalid because the **exclusion from the 15 acre tract of woods** of the Camp Meeting use in relation to the surrounding property is **arbitrary and unreasonable.**

TEST OF REASONABLENESS "BEST USE" OF LAND INVOLVED

Another or additional test of the reasonableness of exclusion of a use is: What is the "best use" of the land involved, including its relation to the immediately surrounding property.

The 15 acre rectangular tract of woods is wholly surrounded by farm and vacant property. On the north side is an orchard; on the east side is Oak Ridge Street, a dirt road, and beyond is farm land; on the south side is farm property called Ames West Lake Park, Annex No. 1 which is entirely vacant and beyond is the road, Forest Drive (formerly Ames Drive); on the west side is Newell's Lane, a 33 ft. road and beyond is farm land and one house valued by the supervisor at $800, located 220 ft. west of the tabernacle, and about 1/4 mile farther west is the road called Lover's Lane (Record 100-108, 128, 143).

That the 15 acre tract of woods is ideal for Appellants' Camp Meeting use is clearly established by the testimony. A witness for Appellants testified:

Q. Why was it that you selected this property . . .

A. Well, we were looking for property and I saw an ad in the paper of some property out on Lover's Lane there, back from the road, and I went out to look at that, and that wasn't desirable because it was quite low and there were not very good trees on it. It wasn't desirable at all, and the real estate man, Mr. Early, told me—said, "There is one other piece of property that is just ideal for what you want" so he took me out and showed me these woods at West Lake.

. . . . . .

We looked over the woods and then my father came over and I told him about it. He went out and looked it over. It met his eye. He had experience with Camp Meetings for about forty years, and it met his eye. He thought it would be very ideal. We went out and talked to Mr. Early and talked with Mr. Mein (Fire Chief who issued permits) and in a few days we consummated the

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deal. For our purpose we thought it was very desirable property. (Record 162-163)

Mr. Corstange—a realtor 38 years who developed a number of subdivisions around Kalamazoo and owned this 15 acre tract of woods for 17 years—testified: "I had it surveyed and staked and put on a sale in 1925. I spent approximately $500 in attempting to dispose of the lots and was able to sell only two (never improved). I did advertise them. I couldn't sell them because it was too far from the lake and too far from transportation. It was from the lake, should say a quarter of a mile possibly." When asked his opinion as a realtor as to demand for such lots he stated: "I soon found out there was no demand for them."

Q. Even in 1943?

A. 1943.

He sold the 15 acres of woods at $125 per acre ($25 per acre less than he paid for it) to a Mr. Shippers on April 16, 1941, who "was going to clear off some and use it for pasture" but abandoned this purpose and put it in the hands of a real estate agent, Mr. Early, and it was sold May 4, 1942 to appellant, Full Salvation Union (Record 170-186)

The 15 acres of woods and the buildings erected thereon will be useless to Full Salvation Union if the denial of the Camp Meeting use by the injunction is allowed to stand. A witness for appellants testified: (Record 203):

Q. You mentioned the tabernacle; is that equipped for year round use?

A. No, it isn't. It is just for Camp Meeting purposes in the summer.

Q. Would that be of much value to you without provision for camp grounds, camp meetings?

A. It would be of no value at all as far as the purpose of erecting it is concerned.

That appellants are making the "best use" of the 15 acre tract of woods is apparent from these facts—which makes denial of the use unreasonable, as held in numerous analogous cases.

Denial of a business and industrial use in a residential district of City of Cambridge, Mass., so that "the locus is of comparatively little value for the limited uses permitted by the ordinance" made the ordinance unreasonable in relation to the uses and development of surrounding property.

Nectow v. Cambridge
277 U. S. 183 (1928)

Denial of an industrial use for a 53-acre tract in a residential district of Chicago was held unreasonable, on evidence that "the highest and best use to which the 53-acre tract, including plaintiff's property, can be put, is manufacturing and industrial; that the 53-acre tract is not suitable for apartment or residential development because of the nature of the surrounding property and the soil conditions; that there is ample vacant property in the surrounding district available for apartment and residential purposes....."

2700 Irving Park Bldg. Corp. v. City of Chicago
395 Ill., 138, 69 N. E. (2nd) 827 (1946)

the court citing (p. 833):

Taylor v. Village of Glencoe
372 Ill. 507, 25 N. E. (2nd) 62

Reschke v. Village of Winnetka
363 Ill. 478, 2 N. E. (2nd) 718

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Tews v. Woolhiser
352 Ill. 212, 185 N. E. 827

Forbes v. Hubbard
348 Ill. 166, 180 N. E. 767

Denial of a business use for a lot in a residential district of a residential suburb of Houston, Texas, was held arbitrary and unreasonable and the "city could not enjoin lot owner from constructing building on lot for business purpose in violation of zoning ordinance, where defendant's lot was practically worthless as residential property."

City of W. University Place v. Ellis
134 S. W. (2nd) 1038 (Com. App. Tex., 1940)

citing Nectow v. Cambridge, **supra**, and many other cases.

Denial of a business or apartment house use on a lot peculiarly adapted thereto, in a residential district of village of Kensington in the Great Neck section of Long Island, N. Y., was held unreasonable, where the Board had relegated "business and industry to a very small section" of the village "in order to preserve it as a secluded quiet community of one-family detached homes."

Dowsey v. Village of Kensington
257 N. Y. 221, 177 N. E. 427 (1931)

Since Appellants are making the "best use" of the 15 acre tract of woods which has not been capable of development otherwise and since it is surrounded by farm and vacant property, the exclusion of the Camp Meeting use therefrom is arbitrary and unreasonable. For this reason alone the injunction should be dissolved.

Point Four

The injunction against the Camp Meeting use is

invalid because Appellants had acquired a **vested property** right to carry on the Camp Meeting on the 15 acre tract of woods.

In May, 1942 and thereafter the Township Board had authority to authorize the Camp Meeting use under Public Act No. 302, 1937 as amended by Public Act No. 69, 1939, Sec. 1 thereof providing: "The Township Board . . . may . . . restrict and determine the areas within which given forms of land utilization shall be prohibited or encouraged, and for such purposes divide any such township into districts . . . For each of such districts regulations may be imposed . . . Such regulations . . . shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses. . . ."

In 1942 before purchasing the property, E. A. Andrews and Marion Andrews, agents of Full Salvation Union explained in detail the contemplated Camp Meeting use of the land to the legal representative of the Township Board, Mr. Mein–the Fire Chief (Record 56, 92, 151-2, 162-4) who was authorized to issue building permits (Record 52, 56, 84, 86-87, 118) and in reliance upon his approval of the use (Record 152) the property was purchased May 4, 1942 (Record 180).

On May 12, 1942, Full Salvation Union applied for and was issued 2 building permits (Record 46, 48, 90-91, 153-4), one for construction of a tabernacle with **wood shavings** for floor, but **no chimney** and **no heating unit** (Record 46-47, 206); the other for a caretakers home, a year round residence, on the Camp Meeting property (Record 48-49). Both were constructed in summer of 1942 (Record 120, 133, 283).

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Also in 1942 Full Salvation Union had the property exempted from taxes (Record 119, 152) by the Supervisor who is charged with enforcement of the ordinance (Sec. 14; Record 118) and is chairman of the Township Board (Record 324.) The Supervisor testified that he inspected the premises in 1942 and watched the camp ground development from the start (Record 120) and saw some of the accessory buildings (cottages and cabins to be occupied during meetings) in 1942 and the others in 1943 (Record 120, 123).

The Fire Chief testified that he and the Supervisor approved outdoor toilets to be placed back in the woods for use during the summer meetings and until modern toilet facilities could be provided (Record 92-93, 154-5).

Two of the accessory buildings were built in summer of 1942 (Record 120, 195, 283) and the others (12) were built in summer 1943 (Record 120, 283-4).

A Camp Meeting was held on the grounds June 26 to July 5, 1942, (Record 192, 223) and a Bible School, August 18-28, 1942 (Record 192, 225, 245), and in the summer of 1943 a Camp Meeting and Bible School were held on the grounds (Record 196) and again in 1944 (Record 114).

Officials of the Township had knowledge of erection of the 14 accessory buildings and these religious meetings, when in November 1943 application was made to the Fire Chief for a permit to construct a garage for the caretaker's home (Record 234).

The permit was held up by the Fire Chief and the Supervisor until the Board met (Record 234-5).

At the Board meeting on Nov. 26, 1943, the permit for the garage was held up by the Board until the accessory buildings were made to comply with the ordinance (Record 64, 77, 87, 122, 242-3, 287).

Then at the meeting of the Board on Dec. 22, 1943, after many discussions with representatives of Full Salvation Union and with full knowledge of all prior operations on the camp ground (Record 43, 56, 63-64, 65, 125-6, 151-2, 238-9, 285, 304) the Township Board officially approved issuance of the permit (Record 59, 77, 122, 135, 242) for the "caretakers garage for his car and tools and whatever he had to work with there" on the camp ground (Record 87, 136) and the permit was issued the same day by the Fire Chief (Record 87-89, 90).

By this course of action by the Township officers and by official action of the Township Board itself, under statutory authority possessed by the Board, and the purchase of the property and expenditure of money and labor in constructing the tabernacle, caretakers home and garage, and numerous accessory buildings by Full Salvation Union and its members, the Camp Meeting use of the property was fully ratified, approved and established as a lawful use and became a **vested right** in Full Salvation Union of which it cannot be deprived under Amendment XIV of the U. S. Constitution. It was so held on analogous facts in

City of Evansville, Ind. v. Gaseteria, Inc.
51 F. (2nd) (C. C. A. 7th, 1931)

The rule is well established that, where a building permit has been issued without fraud to one who has thereafter in good faith expended money in reliance thereon, such owner attains an interest in such permit which is in the nature of a vested right and under such circumstances such permit may not be arbitrarily revoked.

Dobbins v. Los Angeles
195 U. S. 223 (1904)

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Herskovits v. Irwin
299 Pen. 155, 149 A. 195 (1930)

City of Buffalo v. Chadeayne
134 N. Y. 163, 31 N. E. 443 (1892)

Rehmann v. City of Des Moines
200 Ia. 286, 204 N. W. 267 (1925)

Lerch v. City of Duluth
88 Minn. 295, 92 N. W. 1116 (1903)

Hinman v. Clarke 121 App. Dw. 105,
105 N. Y. S. 725, Aff'd 193 N. Y. 640 (1908)

Grimmer v. City of Spokane
64 Wash. 388, 116 P. 878

Pelham View Apts. v. Switzer
130 Misc. 545, 224 N. Y. S. 56 (1927)

The foregoing argument is based on the proposition that the Board had the statutory authority and did approve the Camp Meeting use, but it can also be argued in the alternative, that inasmuch as the ordinance was invalid and inoperative between July 30, 1943 and Oct. 11, 1947, because of lack of power to amend it and thereby comply with constitutional requirements of reasonableness, as explained above under Point I, Appellants clearly acquired a vested right after July 30, 1943, which could not be taken away by the injunction on March 14, 1945.

Furthermore, because the wooded tract is peculiarly suited to the Camp Meeting use and because a Camp Meeting use requires a property of a particular character, today seldom available, that is, a tract having trees and drainage suitable for camping for a few hundred persons, that will comply with state health requirements (Record 25-34, 325-7) and located not too far from urban areas

and highways and yet far enough removed from traffic and urban and industrial and commercial activity that would interfere with outdoor religious meetings—because the property is of this character, Appellants claim that the right of Full Salvation Union in the 15 acre tract is analogous to that recognized by this Court in its **quaere** raised in **Hadacheck v. Los Angeles** 239 U. S. 394 (1915) where an ordinance forbidding brick making in a residence district was upheld but **"quaere** whether prohibiting of digging the clay and moving it from that section would not amount to an unconstitutional deprivation of property without due process of law."

Ex parte Kelso 147 Calif. 609 was cited with approval, "wherein the court declared invalid an ordinance absolutely prohibiting maintenance or operation of a rock or stone quarry" in San Francisco.

The same principle was applied to a gravel pit:

Terrace Park v. Errett

12 F. (2nd) 240 (C. C. A. 6th) 1926

the court stating (p. 243) "There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district **that may be conducted in another locality** (emphasis added) with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content" and referring to Hadacheck v. Los Angeles, **supra,** and Reinman v. Little Rock 237 U. S. 171 as to a livery stable which "could be conducted elsewhere."

Other cases which combine this principle with the principles of the cases on tests of reasonableness for a Zoning Ordinance discussed above include:

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Standard Oil Co. v. City of Bowling Green
50 S. W. (2nd) 960 (Ct. App. Ky., 1932)
where the court relies on the Hadacheck case and also the Nectow, Cleveland Jewish Orphans Home, Women's Kansas City St. Andrew Society, and numerous other cases, as to operation of a gasoline station in a residential district.

Also in point are:

Del Fanta v. Sherman (Los Angeles)
107 Cal. App. 746, 290 Pac. 1087 (1930)

Pacific Palisades Assn. v. City of Huntington Beach, Calif.
196 Cal. 211, 237 Pac. 538 (1925)

Oklahoma City, v. Dolese
48 F. (2) 734 (C. C. A. 10th, 1931)

Because of acquisition of a **vested right** by Full Salvation Union, the injunction, on this ground alone, should be dissolved.

Point Five

The injunction against temporary dwellings in connection with the Camp Meeting use is invalid, since they are necessarily incident to such use.

Having established the Camp Meeting use as a lawful use on the 15 acre tract of woods, the injunction against "erecting, maintaining or using or suffering or permitting the use thereof of any tents, cabins, and/or other structures for camping and/or temporary dwelling purposes," is invalid since without such temporary habitations it is impossible to carry on the use.

No reason is shown for the ban. Insistence that the

temporary dwellings comply with all requirements for permanent year-round homes is refusal to recognize the Camp Meeting use. Compliance with all state health requirements was shown (Record 25-34, 325-7). The tents, cabins and cottages are "accessory buildings" to the tabernacle (Record 203, 247) and were expressly so recognized by the trial court (Record 134) and by the Township attorney (Record 237) and the Township Board agreed to recognize them as such at their meeting on Dec. 22, 1943 (Record 304-305, 305). The ordinance expressly authorizes accessory buildings in Sec. 1 and Sec. 4-10.

Where a Zoning Ordinance permitted the carrying on of a general contracting business a general contractor was held entitled to store on his premises, machinery, tools and accessories regularly used in the conduct of his business.

Greenfield v. Board of City Planning (Los Angeles)
6 Calif. App. (2nd) 515, 45 P. (2nd) 219

Consequently, the Camp Meeting use being valid, use of temporary dwellings is also valid and the injunction against temporary dwellings should be dissolved.

Point Six

The Township as a plaintiff seeking an injunction, **failed to sustain the burden of proof.**

The plantiff in a suit for injunction has the burden of proof. Jones on Evidence, 4th ed. vol. 1, p. 368, citing among others:

Champlin Ref. Co. v. Corporation Commission
286 U. S. 210

U. S. v. American Livestock Com. Co.
279 U. S. 435

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As held by the Michigan Supreme Court, the Township's case is supported by the presumption that the zoning ordinance is valid and by the statutory declaration of nuisance as to noncomplying uses and buildings, yet these only help the plaintiff to make out a **prima facie** case and they are subject to a showing of facts: that the ordinance is arbitrary and unreasonable and that the statutory declaration of nuisance is not supported by the facts.

By the evidence discussed under the foregoing five points, appellants completely overcame both the presumption and the statutory declaration as demonstrated by the numerous cases cited in which ordinances were held invalid as arbitrary and unreasonable under Amendment XIV of the U. S. Constitution. Thereupon, the burden of proceeding with the evidence shifted to the Township which failed altogether to negate the facts produced by appellants or to produce new facts showing a right to an injunction and thereby the Township failed to sustain the burden of proof necessary to establish its right to an injunction.

It has been so held in a case closely in point.

Simms v. City of Sherman (Tex.)
181 S. W. (2nd) 100 (Civ. App. Tex., 1944)

The facts show that appellants have a right to an injunction against the Township and its Board.

Hume v. Laurel Hill Cemetery
142 F. 552 (C. C N. D. Calif., 1905)

Since the injunction denies to appellants a religious use of the 15 acre tract of woods, and since the injunction is invalid because of the reasons hereinabove discussed, appellants' rights to religious freedom are

being abridged contrary to Amendment I and XIV of the U. S. Constitution, and the injunction should be dissolved.

B. AS TO THE CHURCH

As to the partially constructed church building, the legal problems are somewhat different from those as to the Camp Meeting.

Sec. 4 of the ordinance expressly authorizes the construction of churches in the B-Residence district where this church is located.

No question whatever was raised as to compliance of the church building with the building regulations of the ordinance.

The injunction requires summary removal of the partially constructed church building.

The only basis for the injunction is that a permit had not been issued for its construction.

On this point the argument of appellants is:

I That the injunction is invalid because a **permit was granted** and the church has a vested property right.

II That if it be held a permit was not granted then the **refusal to issue a permit was arbitrary and unreasonable** and does not support the mandadatory injunction.

III That a mandatory injunction for **demolition requires evidence of nuisance** such as, that the building does not comply with some building requirement of the ordinance or that for some reason it should not be allowed to stand.

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I. A Permit was Granted.

Although the trial court found that a permit had not been granted (Record 319) yet there is no substantial evidence to support that finding and it is clearly erroneous.

Application for the permit was made by J. F. Andrews for Full Salvation Union on May 16, 1944, to the Fire Chief (Record 242-3, 305) who had authority to issue permits. The permit was fully made out (Record 79-80, Exh. D.) and the proper fee was paid and receipt given (Record 89, 243, 306) but delivery was delayed (Record 89) until the Board meeting on May 22, 1944, at which as recorded in the Clerk's minutes:

"A motion was made and supported to table the building permit of the new church of the Salvation Union until their garage building is completed. Motion carried" (Record 318) and two members of the Board at the meeting interpreted the Board's action with the statement, "Now Reverend Andrews won't be expected to come back here to get a permit when they get the garage built." (Record 296).

Based on the action taken and the Board's discussion J. F. Andrews testified (Record 295-6):

Q. Well, you didn't have a permit for that church building did you?

A. Well, I considered that I did.

Q. You didn't—you knew that it was refused to you?

A. The understanding I had was that as soon as we got the garage built we could go ahead with the church.

Q. Now when you started this church building, had you completed the garage?

A. Yes, I think we had. I explain it to him (Fire

Chief on phone) I says, "We have complied with your request. We worked two days on the garage and we got it all completed except we haven't got the cement floor in." —We thought we would put that in later— "and it isn't painted, and we have got people coming that will do the painting."

From this evidence—application for and making out of permit, payment of fee and the action taken by the Board—it is clear, that a permit was granted, although a formal permit was not delivered. Consequently upon construction of the church building Full Salvation Union acquired a **vested property right** that cannot be taken away by the injunction. Failure to deliver a formal permit cannot prejudice the right of Full Salvation Union to its church property.

Dobbins v. Los Angeles
195 U. S. 223 (1904)

Herskovits v. Irwin
299 Penn 155, 149 A. 195 (1930)

and other cases cited on vested right under Point Four.

However, if it be found that a permit was not granted, yet the arbitrary refusal by the Board to issue a permit will not support the injunction.

II. Refusal to Issue Permit Was Arbitrary and Unreasonable

Construing the action of the Board as not granting a permit, as found by the trial Court (Record 319), then the Board's refusal to issue a permit was arbitrary and unreasonable and will not support the mandatory injunction for demolition.

The application for the permit on May 16, 1944, and payment of the proper fee are admitted (Record 89,

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243). The basis for denial of the permit as recorded in Clerk's minutes of Board Meeting May 22, 1944 (Record 318) was "to table the building permit of the new church of the Salvation Union until their garage building is completed." This is obviously an irrelevant reason and being a refusal of a permit was on its face arbitrary and unreasonble.

This was a repetition of a tactic previously employed when the garage was delayed from Nov. 26, 1943, until the accessory buildings should be converted into year round homes—a position later modified by authorizing permits for the accessory buildings and the garage on Dec. 22, 1944 (Record 242, 305) but then again reversed by refusing permits for the accessory buildings and authorizing the injunction suit April 5, 1944, which was started in June, 1944 (Record 10, 65, 78).

These vaccillating and delaying tactics of the Board over a period of eight months when considered in the light of other events hereinafter discussed under **"Motivation of the Suit"** seem explainable only as a course calculated to discourage appellants from development of the Camp Meeting grounds including construction of the church building, and when it was found this course would not succeed, the suit was started.

Such arbitrary and unreasonable exercise of power will not support the injunction.

Yick Wo. v. Hopkins
118 U. S. 356 (1886)

City of W. Uni. Place v. Ellis
134 Tex. 222, 134 S. W. (2nd) 1038 (1940)

Village of N. Hornell v. Rauber
181 Misc. 546, 555, 40 N. Y. S. (2nd) 938, 946 (1943), citing Village of Mill Neck v. Nolan

233 App. Div. 248, Aff'd. mem. op. 259 N. Y. 596 (1932)

III. Mandatory Injunction for Demolition Requires Evidence of Nuisance

To support a mandatory injunction for demolition the evidence must show that the building does not comply with some building requirement of the ordinance or that for some reason it should not be allowed to stand.

The only basis for issuing the injunction is that a permit had not been issued. The injunction decree reads, "all structures heretofore erected on said premises without building permits or certificates of compliance as required by the provisions of the said Portage Township zoning ordinance, are hereby declared by this Court to be nuisances per se, and defendants shall forthwith remove all such structures within thirty days."

This is not a basis for a mandatory injunction for demolition. The rule as to the required basis for demolition is clearly expressed by the Supreme Court of Porto Rico, which upon an appeal from a judgment dismissing an application for demolition of a structure erected without a permit, stated: "the mere infringement of the same (ordinance) does not justify the demolition of the structure . . . it was not sufficient for the municipality to prove that the appellee had erected a new two-story building without complying with the requirements of the said ordinance, but it should have proved besides that the structure erected . . . was not one that could have been authorized or that it is of such a character that it should not be allowed to stand. The evidence introduced at the trial did not cover these points, and, therefore . . . the

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judgment dismissing the complaint must be affirmed."

Municipality of Ponce v. Solis
25 Porto Rico 117 (1917)

Municipality of Ponce v. Gely
25 Porto Rico 140 (1917)

That this is the rule under Amendment XIV of the U. S. Constitution there could seem to be no doubt, especially when application was made for a permit and the building was erected in good faith.

In all cases where a mandatory injunction for demolition has been granted, there has been a showing that the building violates some building regulation or that the building is a nuisance in fact. Upon extensive research no case has been found where a mandatory injunction for demolition was issued without such evidence. Not to require evidence that the building fails to comply with some building requirement of the ordinance or that for some reason it should not be allowed to stand, is to recognize legislative declaration of nuisance as sufficient for demolition which is contrary to well established legal principles.

Yates v. City of Milwaukee
77 U. S. (10 Wall.) 497 (1870)

Crossman v. City of Galveston
247 S. W. 810, 813 (Sup. Ct. Tex., 1923), 26 A. L. R. 1210

The burden of proof was on the Township to show a right to an injunction.

Selectmen of Sudbury v. Garden City Gravel Corp.
300 Mass. 41, 14 N. E. (2nd) 112 (1938)

Crossman v. City of Galveston
247 S. W. 810, 815 (Sup. Ct. Tex., 1923)

Simms v. City of Sherman
181 S. W (2nd) 100 (Civ. App. Tex., 1944)

Not one word of evidence was introduced to show that the church building did not comply with the building requirements of the ordinance or that for any reason it should not be allowed to stand.

August 25, 1944, the Township appointed George Adams as inspector to report violations of the building requirements of the ordinance (Record 86, 118-119) but at the trial December 26-28, 1944, this inspector was not put on the stand nor did anyone else testify that the building violated any building requirement of the ordinance or that it was a nuisance in fact in any respect.

A mandatory injunction for removal of the building which does not rest on any evidence to support it is itself arbitrary and unreasonable and deprives Full Salvation Union of property without due process of law.

DENIAL OF RIGHT TO RELIGIOUS FREEDOM

Appellants being deprived of the right to build a church and hold religious services therein by an injunction which is invalid are as a result suffering an abridgement in religious freedom guaranteed by Amendments I and XIV of the U. S. Constitution.

Consequently the injunction preventing completion of the church building and requiring its summary removal, in absence of any showing of noncompliance of the building with requirements of the ordinance or of its being a nuisance in fact, is contrary to Amendments I and XIV of the U. S. Constitution and should be dissolved.

However, if the Court is disinclined to dissolve the

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injunction completely then the injunction should be limited to prohibition of continuance of construction until Full Salvation Union, appellant herein, shall again apply for a permit in accordance with the provisions of the ordinance. In this way appellants can be protected from the arbitrary and unreasonable refusal of the Board to issue a permit for construction of the church.

C. MOTIVATION OF THE SUIT

The motivation of the injunction suit is not a zeal for enforcement of the zoning ordinance but (a) prejudice against the religious views and practices of appellants and (b) fear by the Township Board that poor families might occupy the accessory buildings as year round dwellings.

That prejudice motivated this suit, to enjoin appellants from conducting the camp meeting use and from constructing a church in Portage Township, is clearly shown by the references of the attorney for the Township in cross examination of J. F. Andrews (Record 305-307) as to his sermon on "Crucifying Jesus" which he preached over the radio station WKZO in Kalamazoo and sometime thereafter had published on June 15, 1944 in the church paper, "Union Guide," (Township's Exhibit C) copies of which were sent to the Board members (Record 306). To this event the attorney attributes the change in the attitude of the Board between Dec. 12, 1943, when the cabins and cottages were recognized by the Board as accessory buildings and permits were authorized for them, and April 5, 1944, when the Board decided to institute the injunction suit against appellants.

In this Exhibit introduced in evidence by the Township (Record 308, 306, 49) is a clear statement showing the

nature of the prejudice as shown by the conduct of the Board at one of its meetings.

". . . The first matter presented for consideration was a request by three gentlemen for permission to reopen an amusement place of such a character it was stated that those who enter must present evidence to show that they are twenty-one years of age or over, where dancing and drinking and the Lord only knows what else is the order of the program sponsored on and on into the night. A promise was made and accepted at face value about harmonizing with the law concerning the sale of intoxicating beverage to minors, and the admission was made by one member of the board that there was no way for any such place to keep from breaking the law in this regard. It took the Portage Township board less than three minutes to fully agree and nothing was said about the manner in which the band should play or the amount of noise the dancers should be permitted to make.

"The next matter presented was a request by my father, Rev. E. A. Andrews of Battle Creek, the General Pastor of the Full Salvation Union, a religious home missionary enterprise, legally incorporated and protected under the laws of the State of Michigan. His letter addressed to the Portage Township Board, Portage Center, Michigan was read:

"Dear Sirs:

"Having been informed that we are supposed to get building permits for all construction in your township, I hereby make application to build a small accessory building on our campground to be used as a guest chamber. The building will be used a little less than two weeks out of each year to house some minister or other

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distinguished guest during our annual Camp Meeting. The foundation is to be cement and it is to be covered with siding and paint. The size is to be ten feet wide by twelve feet long. These dimensions are adequate for our purpose, because this building is to be used only as a sleeping room or for rest during the day. It will be similar to the better cabins often seen in our tourist camps.

Very respectfully submitted,

E. A. Andrews.

"Following this simple and reasonable request for nearly two hours the Full Salvation Union was criticized. The services held for two weeks each year were too noisy. Those who attended were found fault with because they said "praise the Lord," in the store while buying groceries. One was heard to mutter during the storm that it was not only the buildings but this danged noise while another asserted his only concern in it all was for the ordinance, reminding one of Pilate who attempted to wash his hands of responsibility when he delivered Christ to be crucified. Again and again it was asserted Monday night that the ordinance voted in by the people must bear all the responsibility for this night's doings.

"To counteract this attitude the following, copied from Act 302 of Mich. Public Acts of 1937, the act under which the ordinance was enacted was read. "Where there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of such ordinance, the board of appeals (the Township Board in this instance) shall have power in passing upon appeals to interpret any of its rules, regulations or provisions relating to the construction, structural changes in, equipment or alteration of buildings, or

structures so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done." Here the very law under which the ordinance was enacted throws the responsibility right back on the hands of the board not to always insist on the observance of the strict letter of the ordinance but rather to interpret it in an elastic and reasonable way so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done.

"I do not remember how this responsibility was sidestepped but my father's request was discarded without a vote and thus the Full Salvation Union was refused the privilege of building out under the trees in a secluded spot on their twenty acre camp ground a guest room for the man of God when he comes. It sounds unbelievable. It is so unreasonable it stops expression. Dancing and drinking released in less than three minutes with the admission that the law is sure to be broken but the simple and reasonable request of a man of God who for over forty years has poured out his life for the betterment of society in service to his Lord denied in a two hour storm of words. It is true that God alone knows the reason for this; and if the Portage Township Board has crucified the Son of God afresh and put him to an open shame; but one cannot help when faced with such shameful action, voice the wondering question, Has it happened again?

"Has Barabbas been released, and Christ crucified?

" 'Father forgive them for they know not what they do.' "

This prejudice was also manifested in questions by the attorney for the Township as to the opinions of J. F. Andrews as to the "other churches in Portage Township" and as to whether he

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had said "all the other churches in Portage Township were dead churches" (Record 307) and by the unconscionable inquisition into the history and private finances of Marion Andrews and J. F. Andrews which had no bearing whatever on the alleged zoning ordinance violation (Record 156-7, 208-213, 311-315).

Furthermore with all due respect to the trial judge, yet it must be noted that this prejudice was clearly manifested by the trial judge himself who time after time tried to elicit testimony showing that the church building was not a church building (Record 84-5, 134, 144-5, 150, 297) even going so far as to criticize questions by the attorney for the Township because they referred to the building as a church (Record 297) but this attorney had personally visited the grounds and had seen the building (Record 296) and did not question but that the building was a church as the witnesses testified (Record 154, 316). This effort of the trial judge was abandoned, however, after witnesses for appellants testified as to the character of the building and at no time was it even asserted that the building did not comply with the ordinance or that it was a nuisance in fact.

The trial judge also indulged in argument with a witness for appellants as to **who,** he naming several persons, lived in the vicinity of West Lake (Record 185-6) from which the camp ground is about one-quarter mile distant.

The prejudice of the trial judge was also manifested by his defamatory and libelous opinion attacking the characters of M. E. Andrews and J. F. Andrews for which there was no basis whatever inside or outside the Record and is only explainable as an effort to compensate for lack of evidence that would support the sweeping and cruel injunction that he desired to give.

Besides the prejudice, another factor motivating this suit was the fear that poor families might be allowed to occupy the accessory buildings as residences. The Supervisor who is chairman of the Township Board testified: "that was what the Town Board was disturbed about, because they thought in depression times they might a lot of them be occupied." (Record 126-7).

Speculation as to the right to an injunction if such an eventuality should ever occur is unnecessary. No such condition existed or was threatened. Whatever the misapprehension of the Board may have been, it was not the basis of the injunction issued since the injunction is not designed to meet any such problem. Instead the injunction is calculated to drive appellants completely out of Portage Township as to any camp meeting use or any church services.

While such prejudice and misapprehension have no direct bearing on the validity of the ordinance yet they are factors which the Court can consider in relation to the testimony of witnesses and the validity of the injunction.

2700 Irving Park Bldg. Corp. v. City of Chicago
395 Ill. 138, 69 N. E. (2nd) 827 (1946).

CONCLUSION

Therefore—

Because the blanket exclusion of a Camp Meeting use from the 36 square miles of Portage Township is arbitrary and unreasonable;

Because the exclusion from the B-Residence district in Portage Township of a Camp Meeting use is arbitrary and unreasonable in relation to the character of

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the restricted area as shown by other uses therein permitted and conducted;

Because the exclusion from the 15 acre tract of woods of the Camp Meeting use is arbitrary and unreasonable in relation to the immediately surrounding property since such use is the "best use" of the 15 acre tract of woods;

Because Full Salvation Union had acquired a vested property right to use the 15 acre tract of woods for Camp Meeting purposes;

Because the temporary dwellings are necessarily incident to the Camp Meeting use as a lawful use;

Because Portage Township as plaintiff seeking an injunction failed to sustain the burden of proof necessary to show any right to an injunction against the Camp Meeting use;

Because the mandatory injunction for summary removal of the partially constructed church building is invalid: since either a permit was issued for its construction and the church has a vested right or the refusal of the permit was arbitrary and unreasonable; and since the church building is not shown to violate any building requirement of the ordinance or to be a nuisance in fact; and

Because this injunction suit is motivated by prejudice and not by a desire to enforce the zoning ordinance;

Appellants respectfully urge that the injunction deprives appellants of religious and property rights protected by Amendments I and XIV of the U. S. Con-

stitution and that such denial and deprivation of Constitutional rights involves substantial federal questions, and these rights of appellants will be protected only by a review of this case by this Court.

Respectfully,
Burton Andrews
Counsel for Appellants

CERTIFICATE

This is to CERTIFY that this Petition for Rehearing is presented in good faith and not for delay.

Burton Andrews
Counsel for Appellants